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In The
Supreme Court of the United States

Silver Spur Reserve, a California General Partnership, dba Silver Spur Manor,
Petitioner, Appellee and Cross-Appellant,

v.

The City of Palm Desert and
the Palm Desert Rent Review Board,
Respondents, Appellants and Cross-Appellees.

The Tenants Residing at Silver Spur Mobile Manor
Respondents and Real Parties in Interest.

On Petition for Writ of Certiorari
to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

David C. Spangenberg, Esq.*
Spangenberg & Ritson
314 Center Street, Suite 202
Healdsburg, California 95448
(707) 473-4340

Anthony C. Rodriguez, Esq.
1212 Broadway, Suite 708
Oakland, California 94612
(510) 839-5956

Counsel for Petitioners

*Counsel of Record

36 pp

QUESTIONS PRESENTED

QUESTION NUMBER ONE: IS THE OWNER OF A RENT CONTROLLED PROPERTY PRECLUDED FROM RECOVERING ATTORNEYS FEES UNDER 42 U.S.C. SECTION 1988, WHERE IT HAS ESTABLISHED A VIOLATION OF ITS CONSTITUTIONAL RIGHT TO A FAIR RETURN UNDER 42 U.S.C. SECTION 1983?

The City of Palm Desert's Rent Review Board denied the owner of Silver Spur Mobilehome Park a fair return on investment. The trial court found that the City had violated the owner's constitutional rights and awarded $85,501 in attorneys fees under 42 U.S.C. Section 1988. The appellate court vacated the award of attorneys fees, finding that under the California Supreme Court's decision in Galland v. City of Clovis, an owner of a rent controlled property must either first seek and be denied "damages", or establish a deliberate "flouting" of the law, before it can be awarded attorneys fees under 42 U.S.C. § 1988. The Petitioner contends the denial of attorneys fees is contrary to 42 U.S.C. § 1988.

QUESTION NUMBER TWO: DOES A LOCAL RENT CONTROL ORDINANCE VIOLATE THE TAKINGS OR THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION BY REQUIRING LANDLORDS TO LEASE UNITS AT BELOW MARKET RENTS TO TENANTS WHO EITHER USE THEM FOR VACATION PURPOSES, OR SUBLEASE THEM TO OTHERS FOR PROFIT?

The City of Palm Desert has imposed rent control on all mobilehome parks within the City limits, purportedly to maintain its supply of "affordable housing". However, 29% of the rental spaces at Silver Spur Mobilehome Park are occupied by "tenants" who either use those spaces solely for vacation purposes during the winter months, or sublease them to others for profit. Requiring parkowners to lease mobilehome spaces at below market rents to such "tenants" actually decreases the supply of affordable housing units in the City of Palm Desert. The Petitioner contends the City's rent control ordinance is not rationally related to and/or does not substantially advance any legitimate state purpose with respect to such "tenants", in violation of the takings and/or the due process clause.

LIST OF PARTIES

The Petitioner is Plaintiff and Appellant Silver Spur Reserve, a California General Partnership, dba Silver Spur Mobile Manor. The Petitioner is represented by David C. Spangenberg of Spangenberg and Ritson, 314 Center Street, Suite 202, Healdsburg, California 95448 and by Anthony C. Rodriguez of the Law Office of Anthony C. Rodriguez, 1212 Broadway, Suite 708, Oakland, California 94612.

The Respondents are the City of Palm Desert and the Palm Desert Rent Review Board, represented by Douglas S. Phillips of Best, Best & Krieger, 74-760 Highway 111, Suite 200, Indian Wells, California 92210.

The Real Parties in Interest are "the Tenants residing at Silver Spur Mobile Manor", represented by Kurt Delsack, 537 Newport Center, Suite 383, Newport Beach, California 92660 and by Scott N. Harlow, 777 E. Tahquitz Canyon Way, Suite 200, Palm Springs, California 92262.

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PETITION FOR A WRIT OF CERTIORARI TO REVIEW AN ORDER OF THE CALIFORNIA SUPREME COURT DENYING DISCRETIONARY REVIEW OF THE JUDGMENT OF THE FOURTH DISTRICT COURT OF APPEAL

Petitioner Silver Spur Reserve ("Silver Spur") prays for a writ of certiorari to review an order of the California Supreme Court declining to review the judgment of the Fourth District Court of Appeal of the State of California.

OPINIONS BELOW

The September 26, 2001 order of the California Supreme Court declining discretionary review is included in the Appendix to this petition, at page A1. The June 26, 2001 decision of the Fourth District Court of Appeal is included in the Appendix to this petition, at pages A2 through A48. The January 13, 1999 order of the Riverside County Superior Court awarding attorneys fees under 42 U.S.C. § 1988 is included in the Appendix to this petition at pages A49-A51. The June 3, 1993 judgment of the Riverside County Superior Court finding a violation of Silver Spur's constitutional right to a just and reasonable return is included in the Appendix at pages A52-A55.

JURISDICTION

The California Supreme Court denied Silver Spur's petition for

review on September 26, 2001. This Petition for Certiorari is filed within 90 days of that date. The jurisdiction of this court to review the denial of the Petition for Review is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved the denial of attorneys fees under 42 U.S.C. § 1988, following the violation of a constitutional right under 42 U.S.C. § 1983. 42 U.S.C. Section 1988 provides as follows:

> "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et. seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq), or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

This case also involves the takings and due process clauses of the fifth and fourteenth amendments to the United States

Constitution. The fifth amendment provides in relevant part as follows:

> "No person shall...be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation."

The fourteenth amendment provides in relevant part as follows:

> "...Nor shall any State deprive any person of...property, without due process of law."

STATEMENT OF THE CASE

Silver Spur Mobile Manor is a 215 space mobilehome park located in Palm Desert, California. It is owned by Silver Spur Reserve ("Silver Spur"), a California general partnership. (AR 910).[1] Silver Spur purchased the park in 1977, for $2,000,000. (AR 927). At the time Silver Spur invested in the park there was no rent control in the City of Palm Desert.

After Silver Spur purchased the property the City of Palm

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[1] All references to "AR" are to the Administrative Record from the underlying administrative proceedings. All references to "CT" are to the Clerk's Transcript from the subsequent court proceedings. All references to "RT" are to the Reporter's Transcript from the subsequent court proceedings.

Desert enacted rent control for all mobilehome parks within the City limits. (AR 1-8). As a result of rent control, rents at the park as of September 1, 1993 were only $350 per month. (AR 1045). Rents at comparable parks in the area were as high as $660 per month. (AR 1074).

As a result of its below market rents, Silver Spur became a magnet for vacationers from all over the United States and Canada, as well as people who leased spaces at the rent control rate and then subleased them to others for a profit. In fact, as of September 1, 1993, more than 29% of the 215 mobilehome spaces at the park were rented to people who did not live there on a full time basis, including many "snowbirds."[2] (AR 1580-1593). Because of the below market rents "snowbirds" actually find it cost effective to rent a space at the park 12 months a year, even though they only vacation at the park three or four months a year.

On September 1, 1993 Silver Spur applied for a "discretionary" rent increase pursuant to Section 101(B) of the City of Palm Desert's

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[2] "Snowbirds" are people who live permanently in cooler regions but migrate to the Palm Springs area to enjoy the warm winter months. (AR 2165, line 14 - 2166, line 25).

rent review guidelines, so as to attempt to receive a fair return on investment. Silver Spur also sought the right to obtain market rents from "snowbirds", or people who subleased their spaces to others for profit. (AR 22-40).

The City of Palm Desert conducted hearings on Silver Spur's rent increase application in February and March of 1994. (AR 1796-2570). At those hearings Silver Spur submitted the uncontradicted expert report of Dr. Richard Fabrikant, MBA, Ph.D., demonstrating that in order to receive a fair return on investment it required rent increases of at least $62 per month. (AR 1513). Silver Spur also submitted the uncontradicted expert report of Mr. Gerald Taylor, MAI, finding that even with a $62 per month rent increase Silver Spur's rents could still not be considered excessive. (AR 1074-1078).

The City of Palm Desert's hearing officer issued his first decision on Silver Spur's rent increase application in June of 1994. (AR 2593-2617). The hearing officer concluded that Silver Spur was not entitled to a rent increase because it had supposedly understated its profits by $498,170. (AR 2615, lines 9-18).

On June 24, 1994 Silver Spur appealed the hearing officer's

decision to the Palm Desert Rent Review Board. (AR 2622-2645). The Rent Review Board conducted hearings regarding Silver Spur's appeal on December 2, 1994. (AR 2633-2877). At those hearings Silver Spur demonstrated that it had not understated its profits by $498,170 and that the hearing officer had made a $996,340 mathematical error. (AR 2641, line 22, -2642, line 15, 1540-1541). The Rent Review Board affirmed the hearing officer's decision without discussion of the hearing officer's mathematical error or the "snowbird" issue. (AR 2879).

On February 24, 1995, Silver Spur filed a petition for a writ of administrative mandamus with the Riverside County Superior Court, alleging (i.) that the Rent Review Board's decision had deprived it of a fair return on investment and (ii.) that rent control for "snowbirds" and other people who did not live at the park was unconstitutional. (CT Vol. 1, pp. 1-14). The February 24, 1995 petition also alleged that Silver Spur was entitled to attorneys fees from the City. (CT Vol. 1, p. 12, ¶ 27 and p. 14 ¶ 5).

In its trial brief to the Riverside County Superior Court, Silver Spur again demonstrated that the hearing officer had made a $996,340 mathematical error and had denied Silver Spur a rent increase

necessary to receive a fair return on investment. (CT Vol. 1, pp. 60-61). Rather than ruling on the merits, the trial court remanded the matter back to the Rent Review Board for clarification of its previous findings. (RT 11/15/96, p. 40, lines 12-15). (See also CT Vol. 3, p. 532, lines 16-20).

On April 3, 1997, the Rent Review Board met to again consider Silver Spur's September 1, 1993 rent increase application. (CT Vol. 2, p. 290, ¶¶'s 18-19). On April 9, 1997, the Board remanded the matter back to the hearing officer. (CT Vol. 3, p. 593). On August 11, 1997, the hearing officer issued an amended decision. Once again that amended decision failed to address either the $996,340 mathematical error in the hearing officer's original decision or the "snowbird" issue. Instead, the amended decision stated there was not enough evidence to make a decision. (CT Vol. 3, p. 627).

On May 15, 1997, the Board conducted another hearing, so as to review the hearing officer's amended decision. (CT Vol. 3, pp. 633-661). Once again the Board affirmed the hearing officer's decision, again failing to address the hearing officer's $996,340 mathematical error or the "snowbird" issue. (CT Vol. 3, pp. 663-665). The Board's amended decision was then returned to the Riverside County

Superior Court.

While Silver Spur's petition for a writ of administrative mandamus was still pending before the Riverside County Superior Court, the California Supreme Court issued its decision in Kavanau v. City of Santa Monica, 16 Cal. 4th 761 (1997). In Kavanau, the California Supreme Court ruled that the owner of a rent controlled property could not bring a "takings" claim for "retroactive" rents until it first applied for and was denied retroactive rents by the local rent control board. (Id at 785-786).

In rejecting the landlord's argument that large amounts of damages would accumulate during multiple rounds of litigation, the Kavanau court ruled such "damages" could be avoided if the landlord "promptly" requested a "stay" of the rent control ordinance while the litigation involving his property was pending. (Id at 785). The Kavanau court also reasoned that rather than forcing local rent control boards to pay "damages" for violating a landlord's constitutional rights, it was more equitable for the tenants who benefitted from rent control to pay any lost profits resulting from the litigation process. (Id at 784).

The Riverside County Superior Court ultimately granted Silver

Spur a rent increase of $58.33 per space, so as to enable it to obtain a "just and reasonable return" on its investment. (Appendix, pg. A53). On January 30, 1998 Silver Spur requested the Riverside County Superior Court to "stay" the Palm Desert rent control ordinance pursuant to Kavanau, writing as follows:

> "In Kavanau v. City of Santa Monica, supra, the court ruled that a parkowner could limit past damages by seeking a stay of the rent control ordinance during the litigation. (Id at 785) Now that this court has found that the City has in fact violated Silver Spur's constitutional rights, there is no reason not to grant such a stay in this case. Accordingly, Silver Spur respectfully requests the court to stay the enforcement of the City's ordinance pending any future proceedings in this case, including any and all appeals. In that way, Silver Spur will be free to implement the $59 rent increase effective immediately, thereby preventing still more damages."[3] (CT

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[3] See also Silver Spur's February 12, 1998 letter brief to the trial court, where Silver Spur predicted the damages that were likely to accrue if a "stay" was not granted:

> In this case, the court has found that Silver Spur is entitled to rent increases of approximately $59 per month. If the City exhausts all of its remedies on appeal, this court's ruling

Vol. III, pg. 725).

The Riverside County Superior Court declined to "stay" the operation of the Palm Desert ordinance, as contemplated by Kavanau. (CT Vol. III, pg. 776). In addition, although more than 29% of the spaces at the park were occupied by either "snowbirds" or subtenants, the Superior Court did not allow Silver Spur to charge market rents at those spaces. (CT Vol. III, p. 776). However, the Superior Court did grant Silver Spur's motion for $85,501 in attorneys fees pursuant to 42 U.S.C. Section 1988, finding that Silver Spur had "established a violation of its constitutional right to a fair return on investment". (Appendix, pg. A50). (CT Supp. Vol. II, pgs. 576-577; RT 12/22/98 p. 34, lines 12-23).

On January 29, 1999 the City appealed the trial court's award of attorneys fees to the Fourth District Court of Appeal. Silver Spur

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could be delayed another three years, resulting in further damages to Silver Spur of approximately $456,660. ($59 x 215 spaces x 36 months = $456,660). Accordingly, the court must enjoin the unconstitutional enforcement of the ordinance, pending any further proceedings in this case. (CT Vol. III, pgs. 752-753).

filed a cross-appeal with respect to the "snowbird" issue, and several other issues. While those appeals were pending, the California Supreme Court issued its decision in Galland v. City of Clovis, 24 Cal. 4th 1003 (2001). In Galland, the California Supreme Court found that the owners of rent controlled properties could not recover attorneys fees "as damages" based on the denial of a fair return unless (i.) the landlord requested and was denied back rents or (ii.) the regulatory agency deliberately "flouted" the law. (Id at 1009).

The Fourth District Court of Appeal ultimately upheld the trial court's finding that the City of Palm Desert had violated Silver Spur's constitutional right to a fair return. In fact, the Fourth District Court of Appeal actually awarded Silver Spur an additional $3.67 rent adjustment, thereby increasing to $62.00 the amount required to provide a fair return. (Appendix, pg. A23-A24). However, the Fourth District Court of Appeal relied on the California Supreme Court's decision in Galland to vacate the trial court's $85,501 award of attorneys fees under 42 U.S.C. Section 1988. (Appendix, pg. A28-A47).

On July 26, 2001 Silver Spur petitioned the California Supreme Court for review of the Fourth District Court of Appeal's decision

with respect to the attorney's fee issue and the "snowbird" issue. While that petition was pending Silver Spur also filed a motion with the California Supreme Court, seeking a "stay" of the ordinance pending all further litigation, pursuant to the California Supreme Court's own decisions in Kavanau and Galland. On September 26, 2001 the California Supreme Court denied Silver Spur's petition for review. (Appendix, pg. 1). The California Supreme Court never ruled on Silver Spur's request for a "stay" of the rent control ordinance under Kavanau, so Silver Spur's damages continue to accrue to this day.[4]

The California Supreme Court's decision in Galland v. City of Clovis, 24 Cal. App. 4th 1003, (2001), is directly contrary to federal statutory and case law, because it results in the denial of attorneys fees under 42 U.S.C. § 1988, even after a property owner has established the violation of its constitutional right to a fair return on investment. In addition, requiring Silver Spur to provide below

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[4] There are 215 mobilehome spaces at Silver Spur. If its $62.00 rent increase is ultimately awarded retroactive to October 1, 1993, the damages from the City's denial of a fair return through December 1, 2001 would total $1,306,340.00. ($62.00 × 215 spaces × 98 months = $1,306,340.00).

market rents to people who rent space for "vacation" homes actually decreases the supply of affordable housing for full time residents, in violation of the takings and/or the due process clauses of the federal constitution. Accordingly, Silver Spur's petition for review must be granted to allow consideration of each of these issues.

LEGAL ARGUMENTS

QUESTION NO. 1: ATTORNEYS FEES ISSUES

A. SILVER SPUR HAS A CONSTITUTIONAL RIGHT TO A JUST AND REASONABLE RETURN, SO AS TO PREVENT THE CONFISCATORY TAKING OF ITS PROPERTY

The takings clause of the fifth amendment to the United States constitution prohibits the taking of private property for a public purpose, without the payment of just compensation. U. S. Const. Amend. V. The takings clause applies to the states through the due process clause of the fourteenth amendment. Webb's Fabulous Pharmacies v. Beckwith, 449 U. S. 155, 160 (1980). Originally, the takings clause applied only to the actual physical occupation of land by a governmental agency. Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419, 427, N.5 (1982). However, it has now been

expanded to prohibit the taking of all types of property interests, including takings caused by the enforcement of governmental regulations that "go too far." Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 415 (1922).

The takings clause and the due process clause place constitutional constraints on the ability of local governments to regulate prices, requiring that regulated prices result in a rate of return that is "just and reasonable." Duquesne Light Co. v. Barasch, 488 U. S. 299, 307-308 (1989). Thus, a local government is constitutionally prohibited from setting prices at a confiscatory rate. A confiscatory rate has been defined as one that prevents property owners from receiving a return that is "commensurate with returns on investments in other enterprises having corresponding risks." Power Comm'n v. Hope Gas Co., 320 U. S. 591, 603 (1943). In Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 165 (1976), the California Supreme Court applied the above principles in a rent control context, finding as follows:

> "[Price controls] are within the police power if they are reasonably calculated to eliminate excessive rents *and at the same time provide landlords with a just and reasonable return on their*

> *property.* However, if it is apparent from the face of the provisions that their effect will necessarily be to lower rents more than could reasonably be considered to be required for the measure's *stated purpose,* they are unconstitutionally confiscatory." (Emphasis added)

Based on the above legal principles, it is clear that Silver Spur has a constitutional right to a just and reasonable return. In fact, both the Riverside County Superior Court and the Fourth District Court of Appeal found that Silver Spur had established a violation of that constitutional right. (Appendix, pgs. A53 and A47).

B. SILVER SPUR IS ENTITLED TO ATTORNEYS FEES UNDER 42 U.S.C. § 1988 BECAUSE IT ESTABLISHED A VIOLATION OF ITS CONSTITUTIONAL RIGHTS UNDER 42 U.S.C. § 1983

Under 42 U.S.C. § 1988 a party is entitled to recover its attorneys fees if it establishes a violation of its constitutional rights under 42 U.S.C. § 1983. An award of attorneys fees is appropriate in all types of actions involving the violation of a constitutional right, not merely those involving invidious discrimination. Maine v. Thiboutot, 448 U. S. 1, 10 (1980). In fact, the courts have specifically held that a party is the prevailing party and may recover attorneys fees from a

City if the party successfully challenges the unconstitutional application of a municipal ordinance. Aware Woman Clinic v. City of Cocoa Beach, 629 F. 2d 1146, 1148-1149 (5th Cir. 1980).

A party is entitled to attorneys fees if the judgment is entered in its favor, even though the party does not prevail on its entire claim. Bly v. McLeod, 605 F. 2d 134, 137 (4th Cir. 1979). In short, where a party has established a violation of its constitutional rights, the court has little discretion to deny an award. As stated by the United States Supreme Court in New York Gaslight Club v. Carey, 447 U. S. 54, 68 (1980):

> "...the court's discretion to deny a fee award to a prevailing Plaintiff is narrow. Absent 'special circumstances' fees should be awarded."[5]

The City of Palm Desert refused to provide Silver Spur with a fair return on investment on at least four separate occasions over three

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[5] Under California law there is no need for the prevailing party to specifically plead a violation of 42 U.S.C. § 1983, or any other statute, in order to receive an award of attorneys fees under 42 U.S.C. § 1988. All that is required is that the government be "on notice" that the constitutionality of its conduct is at issue. See Kreutzer v. County of San Diego, 153 Cal. App. 3d 62, 69-70 (1984). ["labeling of pleadings" not required for award of fees under 42 U. S. C. § 1988].

and one half years, in violation of its constitutional rights. Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 165 (1976). In awarding Silver Spur its attorneys fees under 42 U.S.C. § 1988, the Riverside County Superior Court specifically found that the City of Palm Desert failed to provide "an adequate return", in violation of Silver Spur's "constitutional rights". (RT 12/22/98, p. 34, lines 12-23). (See also Appendix, pg. A50: "Petitioner is the prevailing party...having established a violation of its constitutional right to a fair return...").

Because Silver Spur established a violation of its constitutional right to a fair return, the Fourth District Court of Appeal erred in vacating the award of fees under the California Supreme Court's decision in Galland v. City of Clovis.[6] Accordingly, Silver Spur's petition for certiorari must be granted, so this court can make clear that 42 U.S.C. § 1988 provides for attorneys fees based on the violation of all constitutional rights, including the constitutional right of the owners of rent controlled properties to a fair return on investment.

C. SILVER SPUR IS ENTITLED TO ITS

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[6] See also North Carolina Dept. of Transportation v. Crest Street Community Council, 479 U. S. 6, 15 (1986) [party is also entitled under 42 U.S.C. § 1988 to recover attorneys fees incurred in the underlying administrative proceedings].

ATTORNEY'S FEES UNDER 42 U.S.C. § 1988 REGARDLESS OF ANY POST DEPRIVATION REMEDY THE STATE OF CALIFORNIA MAY PROVIDE

Constitutional violations may be addressed under 42 U.S.C. § 1983 regardless of any post deprivation remedy the state may provide. Zinermon v. Burch, 494 U.S. 113, 125 (1990). Similarly, an aggrieved party may file an action under 42 U.S.C. § 1983 without exhausting administrative remedies. Patsy v. Florida Board of Regents, 457 U.S. 496, 516 (1982).

In Kavanau v. City of Santa Monica, 16 Cal. 4th 761 (1997), the California Supreme Court declined to allow the owner of a rent controlled property to pursue a "takings" claim until he first sought and was denied "retroactive" rent increases by the local rent control board. (Id at 785-786). In Galland v. City of Clovis, 24 Cal. 4th 1003 (2001), the California Supreme Court also declined to allow a property owner to pursue attorneys fees "as damages" under 42 U.S.C. § 1983 unless the property owner (i.) first sought and was denied "damages" in a second set of legal proceedings or (ii.) the rent control board deliberately "flouted" the law. (Id at 1009). The California courts have now relied on Kavanau and Galland to deprive Silver Spur of

attorney's fees under 42 U.S.C. § 1988, even though it established a violation of its constitutional right to a fair return. Because the California court's reliance on Kavanau and Galland to vacate an award of attorneys fees under 42 U.S.C. § 1988 is contrary to federal statutory and case law, Silver Spur's petition for certiorari must be granted.

D. EVEN IF KAVANAU AND GALLAND CREATE THEORETICALLY PROPER REMEDIES, AN EXCEPTION MUST EXIST WHERE THE COURTS REFUSE TO GRANT A "STAY" PENDING FUTURE ROUNDS OF LITIGATION

This court has found that 42 U.S.C. § 1983, provides a remedy for the violation of civil rights "where the state remedy, though adequate in theory, was not available in practice". Zinermon v. Burch, 494 U.S. 113, 124 (2001); Monroe v. Pape, 365 U.S. 167, 173-174, 183 (1961). One of the underlying premises of the California Supreme Court's decisions in both the Kavanau case and the Galland case was that unpaid rents or damages would not accumulate during extensive rounds of litigation if a property owner "promptly" requested a "stay" of the local rent control ordinance. As stated by the California Supreme Court in Kavanau, supra:

> Moreover, if a landlord acts promptly to challenge a confiscatory regulation, and seeks a stay of that regulation during litigation, his losses, and thus any future rent adjustments, are likely to be relatively small. A landlord who unnecessarily permits large losses to accumulate cannot complain if the market prevents him from recouping those losses. (Id at 784-785).

In this case, Silver Spur promptly moved for a "stay" of the Palm Desert ordinance pending further litigation. Even though the trial court ruled that Silver Spur was entitled to a $58.33 rent increase, it declined to "stay" operation of the ordinance, thereby allowing hundreds of thousands of dollars in additional damages to accumulate. Moreover, although the California Supreme Court itself created the so-called "Kavanau" remedy, it also refused to stay operation of the Palm Desert ordinance, thereby allowing still more damages to accumulate.

The United States Supreme Court has previously ruled that a party may pursue an action under 42 U.S.C. § 1983 regardless of any post-deprivation remedies the state may provide. However, even if a property owner can be forced to pursue post deprivation remedies under Kavanau and Galland before seeking attorneys fees under 42

U.S.C. § 1988, there must be an exception where the courts refuse to grant a "stay" of the ordinance and allow hundreds of thousands of dollars in damages to accumulate, as the California courts have done in this case.

QUESTION NO. 2: "SNOWBIRD" ISSUES

A. THE PALM DESERT RENT CONTROL ORDINANCE DOES NOT ADVANCE A LEGITIMATE STATE PURPOSE

The fifth amendment to the federal constitution provides that private property may not be taken for public use without the payment of just compensation. The purpose of this requirement is "to bar government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U. S. 40, 49 (1960). Of course, private property may never be take for a "private" purpose, even with the payment of just compensation. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984). Miller v. McKenna, 23 Cal. 2d 774, 782, 783 (1944); Gregory v. City of San Juan Capistrano, 142 Cal. App. 3d 72, 87-90 (1983).

In Pennell v. City of San Jose, 485 U.S. 1 (1988), the City of San Jose's rent control ordinance required landlords to provide special

consideration to low income or "hardship" residents. That particular ordinance survived a challenge under the "takings" clause, on the ground that the challenge was "premature". (Id at 9). Nevertheless, the Pennell court indicated that if the takings claim had not been premature, it would have been analyzed the same as any other regulatory taking case. (Id at 9, 10). Thus, a challenge to rent control under the takings clause may consider whether the regulation requires "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". First English Evangelical Lutheran Church of Glendale v. City of Los Angeles, 482 U.S. 304, 318-319 (1987). A challenge to rent control under the takings clause may also consider whether the regulation "substantially advances" a legitimate state purpose. Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704-705 (1999).

The Pennell "hardship" provision also survived a challenge under the due process clause, in part because the ordinance was found to be rationally related to a legitimate state purpose. (Id at 13). In Pennell, this court also noted that due process claims involving rent control must be analyzed the same as any other price regulation, writing as follows:

> "The standard for determining whether a state price-control regulation is constitutional under the Due Process Clause is well established. Price control is unconstitutional...if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. (Id at 11).

The purported purpose of the City of Palm Desert's rent control ordinance is to maintain the supply of affordable housing. Unlike the situation in Pennell, however, this case does not involve a challenge to a "hardship" provision designed to assist "hardship" renters. Rather, this case involves a challenge to a rent control ordinance that has been applied to benefit people who either lease mobilehome spaces for vacation purposes, or sublease them to others for a profit. Because this aspect of the Palm Desert rent control ordinance does not advance a legitimate state purpose, its constitutionality may be analyzed under the "takings" clause or the "due process" clause.

More specifically, by making "vacation homes" more affordable for "snowbirds", the City of Palm Desert guarantees that there will be less housing available for lower income people, thereby acerbating any affordable housing shortage, not eliminating it. See

152 Valparaiso Associates v. City of Cotati, 56 Cal. App. 4th 378, 383-385 (1997) [ordinance that results in lower supply of affordable housing does not "substantially advance" legitimate state purpose and is therefore unconstitutional]. In addition, by providing "snowbirds" with below market rents, parkowners obviously have less ability to make a fair profit. As a result, parkowners are more likely to apply for rent increases that must then be absorbed equally by both low income "full time" tenants and by "snowbirds". Thus, the City's ordinance results in low income tenants actually subsidizing the vacation homes of "snowbirds", which is not only wholly irrational, it is directly contrary to the public benefit found to justify rent control in Pennell v. City of San Jose, 485 U.S. 1, 13, 14 (1988). Accordingly, a petition for certiorari must be granted with respect to this issue as well.

B. THE CITY HAS NOT OFFERED ANY RATIONAL BASIS FOR CONTROLLING THE RENTS OF VACATION HOMES

In the proceedings below, the City suggested that any rationale set forth by the legislature for controlling the rents of vacation homes must be accepted by the courts. However, the City

failed to cite any provision in the ordinance itself setting forth the rationale for controlling the rents of vacation homes, so that it could be tested by the courts. Instead, the City offered two reasons not set forth in the ordinance to justify the imposition of rent controls on vacation homes. Even if those reasons had been stated in the City's ordinance, they do not justify the imposition of rent control for vacation homes, or homes subleased at a profit.

First, the City argued that burdensome space by space regulation of mobilehome spaces is avoided. However, Section 9.50.030 of the City's own ordinance contain numerous space by space "exemptions" from rent control. (AR 2). Because the City's own ordinance provides numerous space by space "exemptions" from rent control, the City's "burdensome" claim does not change the fact that requiring rent control for vacation homes does nothing to increase the supply of affordable housing.

Next, the City argued that rent control for vacation homes was required in order to avoid "grave equal protection concerns". However, the courts have already held that the failure to control all types of rents within a community does not violate equal protection. Woods v. Cloyd W. Miller Co., 333 U.S. 138, 145 (1948); Kalaydijian v.

City of Los Angeles, 149 Cal. App. 3d 690, 694 (1983).

In short, there is no rational basis for assuming that controlling the rent of "vacation" homes will increase the supply of affordable housing in Palm Desert. To the contrary, controlling the rent of vacation homes will induce more "snowbirds" to come to Palm Desert, thereby decreasing the supply of affordable housing for the full time residents of Palm Desert. (AR 1580-1593). Because controlling the rents of vacation homes is "demonstrably irrelevant" to the City's purported purpose of increasing the supply of affordable housing for the permanent residents of Palm Desert, the petition for certiorari must be granted for this reason as well.

CONCLUSION

The owners of rent controlled properties must be allowed to recover attorneys fees under 42 U.S.C. Section 1988 if they establish the violation of their constitutional rights under 42 U.S.C. § 1983. Because the California Supreme Court's decision in Galland prevents property owners from recovering attorneys fees unless they first pursue a second set of legal proceedings, Galland must be overruled and the Superior Court's award of attorneys fees reinstated. This is especially true where, as here, the courts have refused to "stay" the

rent control ordinance pending the post deprivation proceedings, allowing still more "damages" to accumulate.

Requiring the owners of rent controlled properties to subsidize the "vacation" homes of people who live in other parts of the country, or in Canada, does nothing to increase the supply of affordable housing in Palm Desert. Accordingly, Silver Spur's petition for certiorari should be granted with respect to this issue as well.

Respectfully submitted,

David Spangenberg, Esq.*
Spangenberg & Ritson
314 Center Street, Suite 202
Healdsburg, California 95448

Anthony C. Rodriguez
Attorney at Law
1212 Broadway, Suite 708
Oakland, California 94612

Counsel for Petitioners

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*Counsel of Record